

The Award did not list either Dr. Danny M. Gurba's May 20, 2002, letter to Judge Foerschler or Dr. Gurba's July 15, 2004, Independent Medical Evaluation report as being part of the record. But at oral argument to the Board, the parties agreed that both documents should be included. Additionally, in his appellate brief claimant requested reimbursement for medical mileage. The parties agreed at oral argument, however, that the request for medical mileage was no longer an issue.

ISSUES

On March 27, 2001, claimant fell while working for respondent and injured his left knee. Subsequently, claimant experienced low back pain and right hip symptoms that he contends are a natural consequence of his March 2001 work-related injury and resulting left knee replacement.

In the August 1, 2005, Award, Judge Foerschler awarded claimant disability benefits under K.S.A. 44-510d for a 65 percent functional impairment to claimant's left lower extremity.¹

Claimant contends Judge Foerschler erred. First, claimant argues he aggravated his low back and right hip as a natural consequence of his left knee injury and, consequently, he has sustained a 35 percent whole person functional impairment. Second, claimant contends he has a 93 percent task loss and a 100 percent wage loss. Consequently, claimant requests the Board to modify the August 1, 2005, Award and grant him benefits for a 96.5 percent permanent partial general disability under K.S.A. 44-510e.

Conversely, respondent contends Judge Foerschler correctly determined claimant injured his left knee only and that claimant sustained a 65 percent functional impairment to his left lower extremity. Accordingly, respondent requests the Board to affirm those findings.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

1. On March 27, 2001, claimant slipped and fell, injuring his left knee. The parties stipulated claimant's accident arose out of and in the course of his employment while working as a security guard for respondent.
2. When his left knee pain persisted, claimant sought medical treatment. Eventually claimant saw Dr. Jeffrey T. MacMillan, who in August 2001 performed an arthroscopy on claimant's left knee and also trimmed a medial meniscus tear.

¹ The parties agree an award for only the left knee injury should be computed using 200 weeks for a leg injury rather than 190 weeks as used in the computation set forth in the Award.

3. Claimant's testimony is uncontradicted that before the March 2001 accident he had no symptoms in his left knee and he had never sought any type of medical treatment for it. Nonetheless, an MRI in April 2001 and a second MRI in August 2001 indicated claimant had advanced osteoarthritis in his left knee that would have preexisted his March 2001 accident.
4. Dr. MacMillan released claimant to return to work in late September 2001 and in late October 2001 released him from medical treatment. Subsequently, in November 2001, Dr. P. Brent Koprivica evaluated claimant at claimant's attorney's request. Dr. Koprivica concluded claimant had aggravated and accelerated the preexisting degenerative disease in his left knee and rated claimant as having a 36 percent functional impairment to his left lower extremity. Dr. Koprivica also concluded claimant would ultimately require a total left knee replacement. More importantly, Dr. Koprivica noted claimant had undergone a right hip replacement following a life threatening motor vehicle accident in the 1960s. The x-rays Dr. Koprivica ordered indicated claimant's right femoral head was well positioned and there was no evidence of dislocation.
5. Because of the ongoing pain in claimant's left knee, in December 2001 Dr. Koprivica recommended that claimant be referred to an orthopedic surgeon to be evaluated for a total left knee replacement. Claimant requested additional medical treatment and was eventually seen by Dr. Danny M. Gurba in May 2002 for purposes of an independent medical evaluation. In Dr. Gurba's May 20, 2002, letter to Judge Foerschler, the doctor indicated claimant had severe left knee symptoms that would not improve without replacing the left knee joint.
6. In late September 2002, claimant underwent a left knee joint replacement. Following surgery, however, claimant began developing pain and other symptoms in his right hip and pain in his low back. Claimant attributed his low back and right hip problems to compensating for the left knee injury and falling on his right hip when his left knee buckled.
7. By late 2002, claimant had reported low back pain and right hip pain to the orthopedic surgeon who replaced his left knee, Dr. M. Scott Beall, Jr. The doctor ordered x-rays of claimant's right hip and ordered electrodiagnostic studies of the lumbar paraspinals. While recuperating from the left knee replacement, claimant reported to Dr. Beall that he fell and injured his right hip during physical therapy when his left knee buckled. Dr. Beall last saw claimant in late July 2003, rated him as having a 65 percent functional impairment in the left lower extremity, and released him to return to work. In a July 30, 2003, letter, the doctor indicated claimant's right hip symptoms were from what appeared to be a loosening of the

right hip revision. The doctor also testified that the physical therapy he ordered for claimant after March 2003 was probably for claimant's low back and right hip.

8. Claimant returned to Dr. Koprivica in early October 2003 with increasing right hip pain and low back pain, which claimant attributed to his altered gait. The doctor then concluded claimant's right hip pain resulted from compensating for the left knee injury coupled with the falls claimant experienced due to his left knee buckling. The doctor also concluded claimant was experiencing low back pain due to his altered gait that resulted from the March 2001 accident. Following the October 2003 evaluation, utilizing the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.) Dr. Koprivica rated the injuries claimant sustained from the March 2001 accident as comprising a 75 percent left lower extremity impairment due to the poor result from the left knee arthroplasty, an increased five percent impairment to the right lower extremity due to the right hip, and a five percent impairment to the whole person due to claimant's low back problems. Accordingly, Dr. Koprivica combined those ratings and determined claimant sustained a 35 percent whole person functional impairment as a natural consequence of the March 2001 accident. In short, Dr. Koprivica, like Dr. Beall, believed claimant should be restricted to sedentary activities.
9. Claimant requested respondent to provide him with medical treatment for his right hip, including a hip replacement. Respondent declined. Consequently, in April 2004, the parties appeared before Judge Foerschler at a preliminary hearing at which claimant was seeking the authority to pursue the right hip revision. As a result of that hearing, the Judge again requested Dr. Gurba to evaluate claimant.
10. Dr. Gurba examined claimant in July 2004. This time x-rays of the right hip appeared to indicate the socket had loosened from the surrounding bone stock. Dr. Gurba suspected the loosening had been present for a long time, which could be confirmed by viewing the x-rays Dr. Koprivica took before claimant underwent his knee replacement. Dr. Gurba was not deposed and, therefore, it is unknown whether he ever reviewed those earlier x-rays.
11. As indicated above, Dr. Koprivica believes claimant permanently aggravated his right hip as a consequence of the March 2001 accident and resulting injuries. On the other hand, Dr. Beall believes claimant's increased right hip symptoms were merely temporary and the hip replacement had reached the end of its life span. But both doctors believe claimant is a candidate for a new right hip replacement. Dr. Gurba also recognizes that claimant is an appropriate candidate for a right hip revision but wants claimant to carefully consider the risks of such surgery, which could leave him worse than he is now.

The problem at this point is that the revision surgery for this loosened acetabular component is a very complex and difficult one. With the amount of bone loss that is present in his acetabulum, there would be considerable bone grafting that would need to be done. The femoral component, although tightly cemented at this point, would most likely have to be removed, as it is a mono-block stem and head/neck length cannot be changed on this stem. It would also require disrupting what fibrous union has occurred at the greater trochanteric osteotomy site.²

12. Claimant is adamant that he had no significant right hip symptoms before his left knee joint replacement as he could run even before that surgery. Claimant points out that his March 2001 accident occurred as he was running before he slipped and fell.
13. Considering the entire record, the Board finds it is more probably true than not that claimant permanently aggravated his right hip and low back as a natural consequence of his March 2001 accident. The Board is persuaded by Dr. Koprivica's opinions regarding that issue. Moreover, Dr. Beall's belief that claimant's increased right hip symptoms were only temporary is not supported by claimant's testimony that they progressively worsened following the September 2002 left knee replacement. Accordingly, the Board adopts Dr. Koprivica's opinion that claimant sustained a 35 percent whole person functional impairment as a result of his March 2001 accident.
14. Claimant began receiving Social Security Disability benefits in either late 2002 or early 2003. And in late April 2003, respondent offered claimant a security job that claimant declined as he had not been released by his doctor to return to work. But in January 2005, respondent offered claimant two other security positions that were sedentary and required little walking or other physical activity. Both of the latter jobs were full-time positions with one paying \$9.20 per hour and the other paying \$9.50 per hour.
15. When claimant last testified in this claim, he was neither working nor looking for work.

CONCLUSIONS OF LAW

The August 1, 2005, Award should be modified. The greater weight of the evidence establishes that claimant should receive disability benefits under K.S.A. 44-510e for a 35

² Gurba report (July 15, 2004) at 2.

percent whole person functional impairment. In addition, claimant is entitled to receive medical benefits for treatment of his right hip, including a hip replacement should the claimant decide on that course of treatment.

Because claimant's injuries are not addressed in the schedule of K.S.A. 44-510d, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides, in pertinent part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.** Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*³ and *Copeland*.⁴ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability (a permanent partial general disability greater than the functional impairment rating) as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held that a worker's post-injury wage for the wage loss prong of the permanent partial general disability formula should be based

³ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

upon the ability to earn wages rather than actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁵

The Kansas Court of Appeals in *Watson*⁶ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.⁷

The evidence establishes that claimant has failed to look for any work following his March 2001 accident and that he even refused to attempt to perform the sedentary security positions that respondent offered in early 2005. Accordingly, a post-injury wage of \$9.20 per hour, or \$368 per week, should be imputed for purposes of the permanent partial general disability formula.

The parties stipulated claimant's pre-injury average weekly wage was \$375.84. Because \$368 is more than 90 percent of his pre-injury wage, claimant's permanent partial general disability is limited to his whole person functional impairment rating, or 35 percent. Consequently, the August 1, 2005, Award of permanent disability benefits should be modified.

AWARD

WHEREFORE, the Board modifies the August 1, 2005, Award as follows:

⁵ *Id.* at 320.

⁶ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁷ *Id.* at Syl. ¶ 4.

Richard A. Long, Sr., is granted compensation from Pinkerton, Inc., and its insurance carrier for a March 27, 2001, accident and resulting disability. Based upon an average weekly wage of \$375.84, Mr. Long is entitled to receive 47.57 weeks of temporary total disability benefits at \$250.57 per week, or \$11,919.61, plus \$1,320 in temporary partial disability benefits, plus 132.01 weeks of permanent partial general disability benefits at \$250.57 per week, or \$33,077.75, for a 35 percent permanent partial general disability, making a total award of \$46,317.36, which is all due and owing less any amounts previously paid.

Claimant is entitled to receive ongoing medical benefits for his left knee and right hip. Respondent and its insurance carrier shall appoint claimant an authorized doctor for that ongoing treatment within 10 days of the date of this Order. If respondent and its insurance carrier fail to designate a treating physician, claimant may select his own at respondent and its insurance carrier's expense as authorized medical benefits.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Denise E. Tomasic, Attorney for Claimant
Michelle Daum Haskins, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director